FILE COPY

Office Supreme Court
FILED
DEC 4 1933
CHARLES ELMORE CROPLEY
CLERK

No. 531

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

LEO NEBBIA, *Appellant,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK, *Appellee,*

APPEAL FROM THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT AS AMICUS CURIAE.

WARREN B. BURROWS,
Attorney General;
ERNEST L. AVERILL,
Deputy Attorney General;
H. ROGER JONES,
WILLIAM H. NELSON,
Assistant Attorneys General.

THE CASE, LOCKWOOD & BRAINARD CO.
HARTFORD, CONN.

SUBJECT INDEX

		Page
STATEMENT		1
SUMMARY OF CONNECTICUT MILK CONTROL ACT		5
ARGUMENT		9
I.	It may be fairly said without fear of contradiction that the Production and Distribution of Milk is a Paramount Industry in both New York and Connecticut and one upon which the prosperity of both these states in large measure depends. General Discussion of the Constitutionality of the New York and Connecticut Milk Control Acts	9
II.	The New York Milk Control Act would undoubtedly be sustained if the Court were satisfied that its purpose was solely or primarily to protect the public health and that a price fixing regulation was necessary to insure the continuance of an adequate supply of pure milk	13
III.	The statute may be upheld, inasmuch as it is to remain in force for a limited period only; First, as a Health Measure, on the ground of the elemental necessity of an adequate and sanitary milk supply to the public health; and Second, on the ground that such regulation of the milk business, as a business affected with a public use or interest, is a necessary exercise of the police power in an emergency for the public welfare	16
IV.	Conditions may require the enactment of laws which might be considered arbitrary under normal conditions and although a public emergency cannot become the source of power to suspend the limitations of the Constitution; it may afford a reason for exercising a latent power of government already had but not ordinarily or previously exercised	19
V.	Conclusion	27

TABLE OF CASES CITED

	Page
Beck *v.* Wallace, U. S. Law Week, Sept. 5, 1933, 41 Wash. Law Rep. 633	24
Bissell *v.* Butterworth, 97 Conn. at 615	10
Blaisdell *v.* Home Building & Loan Assn., 249 N. W. Rep. 334	26
Block *v.* Hirsch, 256 U. S. 135	15, 17, 18, 19, 24
Central Lumber Co. *v.* So. Dakota, 226 U. S. 157	20
Chicago, Burlington & Quincy R. R. Co. *v.* McGuire, 219 U. S. 549, 569	16
Crowley *v.* Christensen, 137 U. S. 86	12
Diorio *v.* Morris, et al., Superior Court, New Haven County, Connecticut	4
Economy Dairy Co., Inc. *v.* Wallace, U. S. Law Week, Sept. 5, 1933, 41 Wash. Law Rep. 633	24
810 West End Ave. Inc. *v.* Stern, 258 U. S. 242	17
Fort Smith & Western R. R. *v.* Mills, 253 U. S. 206	19
German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389	20
Levy Leasing Co. *v.* Seigel, 258 U. S. 242	17
Liebermann *v.* Van de Carr, 199 U. S. at p. 558	14
Marcus Brown Holding Co. *v.* Feldman, 256 U. S. 170	17
Munn *v.* Illinois, 94 U. S. 113	19
New State Ice Co. *v.* Liebman, 285 U. S. 262	20, 22, 23, 24
O'Gorman & Young Inc. *v.* Hartford Fire Ins. Co., 282 U. S. 251	17, 20
People *v.* Peretta, 253 N. Y. 305	14
Payne *v.* Kansas, 248 U. S. 112	15
Shelton *v.* City of Shelton, 111 Conn., 433	11, 14
Southport Petroleum Co. *v.* Ickes, U. S. L. J. of Aug. 22, 1933, 41 Wash. Law Rep. 577	26
Tagg Bros. & Moorhead *v.* U. S., 280 U. S. 420	20
Tyson *v.* Banton, 273 U. S. 418	21
U. S. and Wallace *v.* Calistan Packers, Inc. U. S. Law Week, Oct. 10, 1933	25
Wilson *v.* New, 243 U. S. 332	19, 20
Young *v.* Lemieux, 79 Conn. 434, 440	12

TABLE OF STATUTES CITED

	Page
Conn. Milk Control Act, Ch. 107a Cumulative Supplement to Conn. General Statutes 1931-1933 (Ch. 226 Public Acts 1933)	1, 28
Conn. General Statutes Revision of 1930—Chapter 135	6
Conn. General Statutes Revision of 1930—Chapter 194	33
New York Milk Control Act, Chapter 159 N. Y. Laws 1933	1

TABLE OF TEXT WRITERS CITED

Bartlett, Cooperation in Marketing Dairy Products (1931)	9
Cooley on Constitutional Limitations, 8th Ed. Vol. 2, pg. 1236	12
Corpus Juris—Vol. 12, p. 931, 933	12
Cornell Law Quarterly—Vol. 18, p. 410	24
Freund, Police Power, Section 63	12
Michigan Law Review, Vol. 31, No. 8	20
New York Agr. Bull. (1932) No. 267, p. 125	9
New York State Bar Assn. Bulletin, May, 1933, pgs. 219, 223	17, 24
Pitcher Committee of the N. Y. Legislature, Report of	24
Yale Law Journal—Vol. 42, p. 1259	24

APPENDIX

Connecticut Milk Control Act, Chapter 107a Cumulative Supplement to Conn. General Statutes 1931-1933 (Ch. 226 Public Acts 1933)	28

IN THE

Supreme Court of the United States

No. 531

OCTOBER TERM, 1933

LEO NEBBIA, *Appellant,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK, *Appellee,*

APPEAL FROM THE COUNTY COURT OF MONROE COUNTY, STATE OF NEW YORK.

STATEMENT.

The State of Connecticut at the 1933 session of its General Assembly passed an Act entitled—"An Act Creating a Board of Milk Control", Chapter 226 of the Public Acts of Connecticut of 1933, that in many respects is very similar to the New York Milk Control Act, Chapter 159, New York Laws of 1933, and in principle the same. The full text of the Connecticut Milk Control Act is appended to this brief.

The Connecticut Milk Control Board has held a large number of hearings for the purpose of gathering necessary information, established a licensing system for milk dealers and a scale of prices by regulations

made from time to time, the latest of which is as follows:

STATE OF CONNECTICUT

BOARD OF MILK CONTROL

Schedule of Milk Prices Established by the Milk Control Board for the State of Connecticut Effective for all milk bought and sold within the State on and after 12:01 A. M. (standard time) August 10, 1933

	Milk Dealers to Consumers Retail	Milk Dealers to Stores and Wholesale	Stores to Consumers Cash and Carry
MILK: (Raw or pasteurized)			
Quart bottles	.14	.11½	.13
Pint bottles	.09	.07	.08
½ pint bottles	..	.04	..
10 oz. bottles	..	.05	..
Bulk	..	.11	..
Bulk, 40 quarts or over	..	.10½	..
GRADE A MILK: (Raw or pasteurized)			
Quart bottles	.17	.14½	.16
Pint bottles	.11	.09	.10
½ pint bottles	..	.05	..
10 oz. bottles	..	.06	..
Bulk	..	.12½	..
Bulk, 40 quarts or over	..	.12	..
HEAVY CREAM, at least 36%			
Quart bottles	.75	.60	.70
Pint bottles	.40	.32	.38
½ pint bottles	.21	.18	.20
Bulk, less than 40 quarts	..	.50	..
Bulk, over 40 quarts	..	.47	..
Sour cream only, 12 oz. bottles	.30	.25	.28

MEDIUM CREAM, at least 26%			
Quart bottles	.60	.50	.55
Pint bottles	.34	.28	.32
½ pint bottles	.18	.15	.17
Bulk, less than 40 quarts	..	.40	..
Bulk, over 40 quarts	..	.37	..
Sour cream only, 12 oz. bottles	.26	.21	.24
LIGHT CREAM, at least 16%			
Quart bottles	.45	.35	.40
Pint bottles	.25	.20	.23
½ pint bottles	.15	.12	.14
Bulk, less than 40 quarts	..	.30	..
Bulk, over 40 quarts	..	.28	..
Sour cream only, 12 oz. bottles	.20	.16	.18
BUTTERMILK			
Quart bottles	.10	.08	.09
Pint bottles	.07	.05	.06
½ pint bottles	..	.03	..
10 oz. bottles	..	.04	..
Bulk, less than 40 quarts	..	.07	..
Bulk, 40 quarts or over	..	.06½	..

The minimum price of Grade B or market milk in Class 1 is set at 7¾ cents at the dealer's plant modified by transportation charges, fat differentials and other hitherto established charges and credits unchanged in any respect, until modified by a public ruling of the Board. This price is equally binding on the producer and the dealer.

Sour Cream shall sell for the same prices as sweet cream for a like butterfat content.

All milk dealers shall require all stores to pay five cents deposit on each bottle delivered to them.

On dealer's bills to wholesale customers, a discount of 2% off for cash may be allowed as follows, and not otherwise: On monthly bills paid in full on or before the tenth day of the month succeeding the purchases; on weekly bills paid in full within ten days of the first purchase; on spot cash transactions.

All other discounts, rebates, free products, premiums, or other methods of price evasion shall be eliminated. This includes discounts to employees who will pay regular retail prices.

All sales by dealers from their plants direct to consumers shall be charged at the cash and carry price.

Milk sold as Charity Milk shall be paid for by the dealer to the producer at the Class 1 price.

The Board of Milk Control has in some instances revoked licenses and in others instituted prosecutions for violations of the Act. The constitutionality of the Connecticut Act has not been passed upon in any of the higher courts of the State except in the case *Diorio v. Morris,* where Judge Ells of the Superior Court of Connecticut denied an injunction seeking to restrain on constitutional grounds the Board of Milk Control from putting its price schedule into effect. Although not basing his decision on constitutional grounds, Judge Ells in that case expressed the opinion that the Connecticut Act was constitutional.

The Supreme Court of Connecticut has not passed upon the constitutionality of the Act and there are no cases involving its constitutionality pending before that Court at the present time.

Summary of the Connecticut Milk Control Act

The Connecticut Act (Sec. 2) provides for the appointment of a board of milk control by the Governor whose term of office shall be only until and including June 30, 1935. The purposes of the Act, it is stated, (Sec. 4) are to be achieved as far as possible by promoting, encouraging and fostering cooperation among milk producers and dealers and between producers and dealers, and by promoting a more equitable distribution of the burden of the surplus of milk and the elimination of unfair and demoralizing trade practices. The Board of Milk Control is given power (Sec. 5) to investigate and regulate the milk industry in this State, including production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products; but it is specifically provided that the Act does not interfere with or relieve other officers of the State from their duties in accordance with existing statutes, nor alter the requirements as to the standard of milk and its products or their production. The Board is further given the power of subpoena and in case there is a failure to observe any such subpoena, has the power of making application to the Superior Court for an order requiring witnesses to appear and answer questions material to investigations made by the Board. The Board also has power to require reports as to the quantities and sources of milk and milk products and quantities sold, together with prices paid or received and such other information as the Board may deem necessary. It has also the power to act as investigator and to find, report and publish facts ascertained by it on complaints made by producers, dealers or consumers in regard to contracts, agreements and practices alleged

to be unethical and unfair to the industry; the findings of the Board, on such complaints by agreement of parties in advance of hearing to become final and binding. Such investigations may also be made by the Board on its own initiative and reported to the Governor, such reports being public documents.

The Board is given power (Sec. 6) to fix and establish from time to time a minimum price for the different markets of the State for each class of milk to be paid to producers; to be paid by consumers; to be paid to dealers by wholesale purchasers; and to be paid to stores by consumers.

Milk dealers are required to be licensed by the Board (Sec. 7) and no person shall distribute or sell milk within the State unless licensed as provided in the Act; nor shall any person licensed sell or offer for sale any milk or cream to any unlicensed dealer in the State if such other dealer under the provisions of the Act should be licensed. Applications for such licenses are required to be made to the Board in writing by all those who were in the business of selling milk at the time of the passage of the Act. After July 1st, 1933 persons before engaging in the business of milk dealer shall file an application to be licensed. The Board is given the authority to refuse a license to an applicant or revoke the license of a licensee if the applicant or licensee has not complied with and is not prepared to comply with the provisions of Chapter 135 of the General Statutes and the rules and regulations set up by said Chapter by the milk regulation board. (Chapter 135 of the General Statutes is the pure food and drug act and portions of

said Chapter deal with various phases of milk production and milk products and establish a milk regulation board with power in said milk regulation board of establishing and putting into force rules and regulations in connection with the inspection of dairies and the production, care, handling, marketing and sale of milk and cream within the State to protect the public from the use of milk or cream which is insanitary or detrimental to the public health.) Licenses may also be refused or revoked where the applicant or licensee has refused, without reasonable cause, milk agreed to be purchased from a producer; or where the applicant or licensee has failed, without reasonable cause, to account and make payment for milk so purchased; or where a general assignment for the benefit of creditors has been made or the applicant or licensee has been adjudged a bankrupt, unless a bond in satisfactory amount is furnished establishing adequate proof of ability to pay for milk purchased; that the applicant or licensee is engaged in unfair practices such as giving milk with other purchases or allowing rebates other than ordinary trade discounts; that the applicant or licensee has failed to keep records or furnish statements required by the Board under the provisions of the Act; and that the applicant or licensee has failed to comply with minimum prices fixed by the Board under authority of this Act.

The applicant for a license (Sec. 8) shall state the amount of milk usually distributed or sold or proposed to be distributed or sold as a daily average and thus establish the basis for the fee for each license. The first license period is to June 4, 1934 and the following

license period is from July 1, 1934 to and including June 30, 1935.

The method of appeal by any person aggrieved by any action of the Board is provided for (Sec. 9) and the Board is required to act upon applications for licenses within twenty days from their receipt (Sec. 10).

The provisions of the Act shall not revoke or abridge any existing contract of any cooperative organization engaged in making collection sales or marketing of milk for the producers thereof, or affect any contract between a non-resident milk dealer and a resident milk producer or a resident milk dealer and a non-resident milk producer, or prevent the giving of milk for charity or milk to be distributed to needy persons for charitable relief or the furnishing of milk for charitable purposes at a price below that fixed by the Board.

The Board is given authority to make and revise rules and regulations from time to time as may be necessary for the administration of the Act, such regulation to state its effective date and a copy to be filed in the office of the Secretary of State, each regulation to be published in such manner as the Board may determine (Sec. 13).

A penalty for violation of the Act of a fine not exceeding five hundred dollars or imprisonment for not more than one year, or both, is provided (Sec. 15).

ARGUMENT.

I.

It may be fairly said without fear of contradiction that the Production and Distribution of Milk is a Paramount Industry in both New York and Connecticut and one upon which the prosperity of both these states in a large measure depends. General Discussion of the Constitutionality of the New York and Connecticut Milk Control Acts.

The foregoing statement of fact is not questioned and as to the State of New York, it is conceded, as is clearly indicated by the opinions in the New York Court of Appeals in this case. Consumers in this country annually pay approximately four billion dollars for dairy products. The income to the farmer is normally greater from this source than from any other branch of farming.

> *Bartlett, Cooperation in Marketing Dairy Products* (1931) 1, 2.

New York ranks third among the States in the production of milk and second in the value of dairy products.

> *New York Agri. Bull.* (1932) No. 267, 125.

From the terms of both the Connecticut and New York Acts, it may readily be seen that they are in the nature of emergency legislation and their purpose is to deal, for a temporary period only, with the commonly known chaotic condition of the milk industry in both the States of Connecticut and New York. In its present form this legislation is absolutely limited to a period not extending beyond March 31, 1934 in New York and

June 30, 1935 in Connecticut, and primarily its expressed purposes are to protect the public health and welfare and to that end to promote, encourage and foster cooperation among milk dealers and between milk producers and milk dealers, and to eliminate unfair and demoralizing trade practices in the production, sale and distribution of milk and milk products, whereby the dairy industry in both these States and the constant supply of pure milk to their inhabitants are imperiled. There is also the thought of promoting a more equitable distribution of the burden of the milk surplus. By these purposes as expressed in this legislation the Legislatures of both States recognized existing conditions and sought to create a state agency for a limited period with specified powers to meet the emergency and so far as possible eliminate or assist in eliminating the existing conditions creating the emergency.

A statute must be construed according to the legislative intent; its subject-matter, its object and remedy; i.e., in view of its general purpose, and the legislative intent is obtained from the language used in the light of surrounding or existing circumstances. Furthermore, no mandate of a State Legislature is to be presumed or declared void unless it clearly and plainly violates the Constitution; and furthermore, any enactment of a State Legislature is to be reconciled with the Constitution, both Federal and State, if possible.

> "Every act of the legislature should be so construed as to give it force and effect to accomplish the manifest intention of the legislature."
>
> *Bissell v. Butterworth,* 97 Conn. at 615.

In a comparatively recent Connecticut case, *Shelton v. City of Shelton*, 111 Conn., 433, the Supreme Court of Errors has considered various matters concerning the regulation of the production, marketing and sale of milk, and held that such measures are clearly within the proper exercise of the police power of the State.

Therefore, where an act outlines its purposes and seeks to promote and encourage cooperation among producers and dealers in such a universal and needed food commodity as milk and to promote a more equitable distribution of the burden of milk surplus which has demoralized the milk market, and in so doing to promote the public health and welfare, as it cannot reasonably be expected that sanitary conditions in production and distribution can in such circumstances long be maintained in the case of a commodity so susceptible to contamination and deterioriation as milk, and further seeks to eliminate unfair and demoralizing trade practices in such a universal food product, with the power of investigating and regulating the industry and to provide for the licensing of persons engaged in the business, we believe that the Act comes within the police powers inherent in any sovereign state and does not contravene constitutional provisions.

The legislation in question, we believe is in the interests of public welfare and so far as any right of contract is concerned, we furthermore believe such a right is not absolute.

> "Freedom of contract is not absolute. It is subject to reasonable legislative regulation in the interests of public health, safety and morals,

and, in a sense not resting merely on expediency, the public welfare."

Cooley on Constitutional Limitations, 8th Ed., Vol. 2, p. 1236.

Primarily, where a situation exists proper for legislative action under the police power, the legislature is the sole and exclusive judge to what degree its power should be exercised. It is only when legislative regulation of a proper subject under the police power is carried to the point where it becomes prohibitive, destructive or confiscatory, that the reasonableness of such legislation may be considered by the courts. The foundation of the police power is the control of private interests for public welfare; therefore, a statute is not rendered unconstitutional by the mere fact that private rights of person or property are subject to restraint or that loss will result to individuals from its enforcement.

Freund, Police Power, Section 63; 12 C. J. 931, 933;
Crowley v. Christensen, 137 U. S., 86.

A large discretion is necessarily vested in the legislature to determine not only what the interests of public health, safety and morals require, but what measures are necessary for the protection of such interests.

Young v. Lemieux, 79 Conn., 434, 440.

The only rulings that the Board of Milk Control can make under the New York or the Connecticut statutes are such as embrace all milk dealers or licensees coming within the provisions of the Act. There is no provision in the Act whereby the Board can pick out one or spe-

cific individuals, but the Act is all inclusive and treats all similarly situated or circumstanced alike.

In the prevailing opinion in the New York Court of Appeals in this case Chief Justice Pound says:

> "The production of milk is, on account of its great importance as a human food, a chief industry in the State of New York. * * * It is of such general importance as to justify the assertion that the general welfare and prosperity of the State in a very large and real sense depends upon it. The entire milk product cannot be sold locally. It must be sold to milk gatherers to be shipped to the centers of population. Distributors buy the milk from the farmers. The purchaser is compelled to take what the shipper offers. The shipper offers a low rate at which milk cannot profitably be produced. The State seeks to protect the producer by fixing minimum prices for his milk to keep open the stream of milk flowing from the farm to the city and to guard the farmer from substantial loss. Price is regulated to protect the farmer from the exactions of purchasers against which he cannot protect himself."

It may likewise be said that all of these conditions are, without fear of contradiction, equally applicable to the State of Connecticut.

II.

The New York Milk Control Act would undoubtedly be sustained if the Court were satisfied that its purpose was solely or primarily to protect the public health and that a price fixing regulation was necessary to insure the continuance of an adequate supply of pure milk.

There are already numerous regulations affecting every phase of the milk business, both sanitary and economic, in both the State of Connecticut and New York. We quote the following from the opinion of Chief Justice Wheeler of Connecticut in the case of *Shelton v. City of Shelton* (supra) to which we have already referred.

> "Milk is in universal use as a food; it is peculiarly liable to contamination and adulteration. Therefore, in the interest of public health and safety the regulation of its production, marketing and sale are held to be within the proper exercise of the police power of the State."

In New York a statute requiring a bond from milk stations to secure payment to producers was upheld.

> "When the legislature takes notice of the dependency of the city on the farm and of the hard and often unremunerative character of farm life, we think it may protect the farmer from fraud arising from the peculiar conditions under which milk is sold and produced."
>
> *People v. Perretta,* 253 N. Y., 305, 311.

In sustaining the constitutionality of the Sanitary Code of the City of New York regulating the sale of milk in that city, this Court said in *Lieberman v. Van De Carr,* 199 U. S. at p. 558:

> "The right of the state to regulate certain occupations which may become unsafe or dangerous when unrestrained, in the exercise of the police power, with a view to protect the public health and welfare, has been so often and so

> recently before this court that it is only necessary to refer to some of the cases which sustain the proposition that the state has a right, by reasonable regulations, to protect the public health and safety."

Commission merchants have been required to give a bond for honest accounting in the business of dealing in farm products.

Payne v. Kansas, 248 U. S. 112.

The New York legislature believed that the existing milk situation made a price fixing regulation necessary to the continued production and distribution of pure milk and the protection of the public health due to the threatened economic disintegration of the great dairy industry in that State. As to the effectiveness or economic wisdom of such a regulation there are undoubtedly differences of opinion and no one can now safely judge. We believe, however, that this legislation bears at least a reasonable relation to the protection of the public health and, therefore, should be sustained as a health measure. The thought or principle we have in mind is clearly stated by Mr. Justice Holmes in the prevailing opinion in the case *Block v. Hirsch,* 256 U. S. at page 158:

> "Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern of course with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world, is futile or has no reasonable

relation to the relief sought. *Chicago, Burlington & Quincy R. R. Co. v. McGuire,* 219 U. S., 549, 569."

III.

The statute may be upheld, inasmuch as it is to remain in force for a limited period only; *First,* as a Health Measure, on the ground of the elemental necessity of an adequate and sanitary milk supply to the public health; and *Second,* on the ground that such regulation of the milk business, as a business affected with a public use or interest, is a necessary exercise of the police power in an emergency for the public welfare.

Milk is recognized by health authorities as a necessary item in the diet of the American people and is also authoritatively said to be relatively the cheapest source and most favorable combination of chemical and other properties necessary to preserve human life and health. It was aptly said in connection with the New York milk control legislation as to the first of these premises:

> "Under certain circumstances a monopoly may be contrary to the public interest. Under other circumstances competition may become an evil as in recent months when price cutting wars have driven down the price of *sanitary* milk far below the cost of production."

And, as to the second—

> "The conclusion is clear that the power to regulate and the extent of the regulation may not be measured by any abstract formulae and that the general guaranty of individual liberty and due process of law are subject to varying interpretation depending upon differing economic

conditions. New callings and new conditions have called for new remedies and the extension of existing ones. *In the last analysis current public opinion molding the social conscience is the silent force back of and beneath the legal language employed to sustain or reject a statute seeking to include a business as one affected with a public use.*"

> "*Legal Aspects Leading to Milk Control Law*", *by James T. Cross, New York State Bar Assoc. Bull.* May 1933, pgs. 219, 223.

It is important to observe that statutes under review in our courts involving price regulation in many instances relate to a private or ordinary business as opposed to one of vital public concern and that there is the further important difference between the *permanent* inclusion of a business as one affected with a public use or interest and a *temporary* inclusion, to tide over a grave public emergency. Also that—

> "As underlying questions of *fact* may condition the constitutionality of legislation of this character, the *presumption of constitutionality must prevail* in the absence of some factual foundation of record for overthrowing the statute."

> *O'Gorman & Young Inc. v. Hartford Fire Insur. Co.*, 282 U. S., 251.

The constitutionality of emergency legislation of this type has been sustained by this Court in the so-called Rent Cases, *Block v. Hirsch* (supra); *Marcus Brown Holding Co. v. Feldman*, 256 U. S., 170; *Levy Leasing Co. v. Seigel*, 258 U. S., 242, and *810 West End Avenue, Inc. v. Stern*, 258 U. S. 242. In the case of

Block v. Hirsch, the court held that if *during the emergency* the business of renting real property in the District of Columbia held such a peculiar relation to the public interest as to justify it, there would be superinduced upon that business the right of public regulation. After commenting upon the scope of the police power under which property rights may be cut down and, to that extent, taken without compensation; for example, by limiting the height of buildings in a certain quarter of a city and other like instances, Mr. Justice Holmes in the prevailing opinion goes on further to say, at page 156:

> "These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded

that regulations of the present sort pressed to a certain height might amount to a taking without due process of law."

And again at page 157—

"The main point against the law is that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the Commission established by the act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois,* 94 U. S. 113. It is said that a grain elevator may go out of business whereas here the use is fastened upon the land. The power to go out of business, when it exists, is an illusory answer to gas companies and waterworks, but we need not stop at that. *The regulation is put and justified only as a temporary measure.* See *Wilson v. New,* 243 U. S. 332, 345, 346; *Fort Smith & Western R. R. Co. v. Mills,* 253 U. S. 206. *A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.*"

IV.

Conditions may require the enactment of laws which might be considered arbitrary under normal conditions and although a public emergency cannot become the source of power to suspend the limitations of the Constitution, it may afford a reason for exercising a latent power of government already had but not ordinarily or previously exercised.

The temporary regulation of wages of railroad employees was sustained in *Wilson v. New*, 243 U.S., 332, and it was held that the business of insurance is not only so far affected with a public interest that the State may regulate the *rates*, in *German Alliance Insurance Co. v. Lewis*, 233 U. S., 389, but that the *compensation* or *commission* of an insurance agent may also be limited by statute to less than the amount he would otherwise receive under his contract were it not for such limitation, in *O'Gorman & Young Inc. v. Hartford Fire Insur. Co. (supra)*.

In *Central Lumber Co. v. So. Dakota*, 226 U. S., 157, the "one price" statute of the State of South Dakota was held constitutional. The case of *Tagg Bros. & Moorhead v. U. S.*, 280 U. S., 420, decided by a unanimous court, upheld the validity of a federal regulation of live stock commission men's rates. We would also respectfully refer the Court to the following extracts from an article entitled *"Federal Anti-Trust Law and the National Industrial Recovery Act"*, by *Howard E. Wahrenbrock, published in June 1933 in Vol. 31, No. 8 of the Michigan Law Review.*

At page 1056:

> "In the recent case of *New State Ice Co. v. Liebmann*, (285 U. S. 262) the Court held invalid under the due process clause of the Fourteenth Amendment a state licensing requirement for engaging in the business of manufacturing ice, on the ground that the business was a private business and not affected with a public interest. Since *Munn v. Illinois* the problem of determining whether a regulation of busi-

ness is valid has been stated in terms of this test. Under it, state regulations of the charges of grain elevators, railroad rates, fire insurance companies' rates, rents in the war emergency, and cotton ginning have been upheld; while statutes such as the Kansas Industrial Court Act, a New York statute regulating theatre ticket brokers' fees, a New Jersey statute regulating fees of employment agencies, a Tennessee statute attempting to fix the price of gasoline, and, in the *Liebmann* case, an Oklahoma statute regulating the manufacture of ice have been declared invalid.

"Without essaying a re-examination of all aspects of the question of when a business is affected with a public interest, *it may be noted that the fact that the competitive system is not functioning properly in a particular line of business has frequently been referred to as justifying the conclusion that that business is affected with a public interest.* Justice Stone, dissenting in the New York theater ticket brokers' fee case, *Tyson v. Banton,* 273 U. S., 418 at 451-2, declared:

> *'Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community.'*

"And Justice Sutherland, speaking for the majority in the *Liebmann* case, declaring that ice companies do not have a monopoly today because of mechanical refrigeration, said:

> 'Moreover, the practical tendency of the restriction . . . is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.
>
> 'The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.
>
> 'It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources.'

"Justice Brandeis dissenting in part on the ground that the competitive system had not functioned in the ice industry in Oklahoma:

> '. . . in only six or seven localities in the State, containing, in the aggregate, not more than 235,000 of the total population of approximately 2,000,000, was there "a semblance of competition"; and that even in those localities the prices of ice were ordinarily uniform. The balance of the population was, and still is, served by companies enjoying complete

monopoly . . . Where there was competition, it often resulted to the disadvantage rather than the advantage of the public, both in respect to prices and to service.

'It is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design. The certificate of public convenience and invention (sic. necessity?) is a device—a recent social-economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest.'

"While the quotations from the two opinions in the *Liebmann* case show a conflict as to the application of the underlying principle, *both recognize that the way in which the competitive system is functioning in a line of business has significance with reference to the question whether that business is affected with a public interest.*"

And at page 1065:

"That an economic emergency may clothe business with a public interest which might not be so characterized but for those conditions, is well established.

'The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in

other places would be a matter of purely private concern.' (Block v. Hirsch, supra.)

"And in the *Liebmann* case, Justice Sutherland recognized that where the prosperity of an entire State depended upon a business, that business was affected with a public interest. Speaking of the ice business in Oklahoma, he declared:

'Here we are dealing with an ordinary business, not with a paramount industry upon which the prosperity of the entire state in large measure depends.'"

The competitive bargaining system has not worked well in the milk business and experience over a long period of years shows that competition has not efficiently regulated the business or adequately adjusted the supply of milk to the demand.

"Constitutionality of Regulating Milk as a Public Utility", Manley, 18 Cornell L. Q. 410;
"Legislative Regulation of the New York Dairy Industry", 42 Yale Law Journal, 1259;
"Legal Aspects Leading to Milk Control Law", Cross (supra);
Report of the "Pitcher Committee" of the New York Legislature.

As showing the trend of recent decisions on the constitutionality of price fixing regulations, we respectfully refer the Court to the cases *Beck v. Wallace* and *Economy Dairy Co. Inc. v. Wallace,* in the Supreme Court of the District of Columbia, unofficially reported in *U. S. Law Week,* Sept. 5, 1933, 41 *Wash. Law Rep.*

633, sustaining the power of the Secretary of Agriculture under the Agricultural Adjustment Act to license milk dealers and set the prices they were to pay for milk and the prices at which they were to sell milk. The Court's decision in these cases was as follows:

> "The court finds that a national emergency exists and that the welfare of the people and the very existence of the Government itself are in peril. The day has passed when absolute vested rights in contract or property are to be regarded as sacrosanct or above the law. Neither the necessities of life nor commodities affected with a public interest can any longer be left to ruthless competition or selfish greed for their production or distribution.
>
> "The court finds that the Agricultural Adjustment Act passed by Congress May 12, 1933, is constitutional and that the regulations and licenses promulgated thereunder are reasonable and valid."

In *United States and Wallace v. Calistan Packers, Inc.* (decided Oct. 2, 1933 in the U. S. District Court for the Northern District of California), *U. S. Law Week,* Oct. 10, 1933 at p. 85, the first injunction to prevent violation of a quota for canners in the peach industry was granted under the Agricultural Adjustment Act and the Court held that the marketing agreement and license for cling peaches canned in the State of California promulgated thereunder were constitutional and valid. The court in this case found that ninety-nine and nine-tenths percent of the national production of canned peaches for interstate and foreign commerce is packed in the State of California, and held that in

view of the existing conditions of overproduction and ruinous competition,

> "the peach industry is affected with a national public interest and that the Congress has the constitutional power to adopt appropriate legislation to curb these evils."

We would also respectfully refer the Court to the recent case *Southport Petroleum Co. v. Ickes*, in the Supreme Court of the District of Columbia, *U. S. L. J.* of Aug. 22, 1933, p. 473, 41 *Wash. Law Rep.* 577, involving the constitutionality of Title I par. 9 (*c*), providing for oil regulation, of the National Industrial Recovery Act where the right of the Secretary of the Interior to prohibit the shipment in interstate commerce of oil alleged to have been illegally produced under a Texas statute was sustained.

We would also mention the recent decisions in the State Courts on the constitutionality of the widely enacted state mortgage moratorium laws, some of which have been sustained as emergency legislation and others held invalid on constitutional grounds. Inasmuch as an appeal from a decision by the Minnesota Supreme Court in one of these cases, *Blaisdell v. Home Building & Loan Assn.*, 249 N. W. 334, in which the State Court held the law a valid exercise of the police power, in view of the economic emergency, although it impaired the obligations of a mortgage contract, the court holding that such impairment was only temporary and no more than reasonably necessary and that the law was general and not objectionable as special or class legislation, was very recently fully argued before this Court at the present term, we deem it unnecessary to make further reference to these decisions.

V.

CONCLUSION.

In conclusion, we respectfully maintain that the production and distribution of milk is undeniably a paramount industry in the State of New York, upon which the prosperity of the entire State in large measure depends (the same may be said with equal force of Connecticut) and that the State Legislature believed that conditions in that industry made price fixing legislation temporarily necessary to the continued production and distribution of pure milk in that State, which was a vital necessity to its inhabitants and to prevent the threatened economic disintegration of the great dairy industry of that State. We, therefore, respectfully submit that this statute should be sustained, both as a necessary measure for the protection of the health of the citizens of New York and as a necessary and valid regulation of the milk business in that State in an emergency and for the public welfare, as a business affected with a vital public interest, in the firm belief that this legislation is, in its purposes, within those primary powers of government guaranteed by the State and Federal Constitution.

Respectfully submitted,

WARREN B. BURROWS,
Attorney General;

ERNEST L. AVERILL,
Deputy Attorney General;

H. ROGER JONES,
WILLIAM H. NELSON,
Assistant Attorneys General.

Appendix

CONNECTICUT MILK CONTROL BILL

Chapter 226 Public Acts 1933

An Act Creating a Board of Milk Control

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. The following terms, as used in this act, unless otherwise clearly indicated by the context, shall be defined as follows: "Board" shall mean the state agency created by this act, to be known as the "board of milk control"; "person" shall mean any person, firm, corporation or association; "class" shall mean the milk used for each of the purposes for which milk is commonly used, such as fluid milk, cream or other specified class; "milk" shall mean fluid milk and cream; "milk dealer" or "dealer" shall mean any person who distributes within the state for sale therein or who sells within the state, except for consumption on the premises where produced or sold, milk as hereinbefore defined, provided producers who retail their own milk shall not be considered as dealers under the provisions of this act unless they sell more than the minimum quantity established by said board nor shall a producer who sells milk to a dealer or distributor be considered a dealer as herein defined; but any persons, firms, associations and corporations maintaining and operating separate plants and subsidiaries of such corporations shall be deemed milk dealers with respect to each plant or store so maintained and operated by them respectively; "licensee" shall mean a licensed milk dealer, but the term "licensee" shall not include a milk dealer who distributes or sells milk in an average daily quantity below that established by the Board as the minimum average daily quantity requiring a

license; "producer" shall mean a person producing milk within this state and "consumer" shall mean any person, other than a milk dealer or storekeeper, who purchases milk.

Section 2. The governor shall appoint a board of milk control consisting of three persons, two of whom shall be producers of milk and one of whom shall be designated as chairman. The term of office of each member of said board shall be from the date of his appointment until and including June 30, 1935. Any vacancy in the membership of said board shall be filled by appointment by the governor. Any member of the board may be removed by the governor for cause. Legal services and the services of experts in other lines shall be performed, as far as reasonably possible, by the state departments, including the department of agriculture, the department of the dairy and food commissioner, the state department of health and the attorney general and his assistants.

Section 3. Said board shall be allowed actual traveling and other expenses incurred in the performance of its duties and each member shall receive a per diem compensation for the time actually spent in the performance of his duties, such compensation to be determined by the board of finance and control. Said board is authorized to employ such persons as may be necessary in its opinion to assist it in its duties and may prescribe their duties and fix their compensation, subject to the approval of the board of finance and control; provided the cost of administration of said board, including expenses and compensation of members, shall not exceed the amount received as license fees collected under the provisions of this act.

Section 4. The board shall seek to achieve the purposes of this act as far as possible by promoting, encouraging and fostering co-operation among the producers, among dealers and between producers and dealers and

by promoting a more equitable distribution of the burden of the surplus and the elimination of unfair and demoralizing trade practices.

Section 5. (a) Said board shall have power to investigate and regulate the milk industry in this state, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products, provided nothing in this act shall relieve officials of the state from their duties in accordance with the statutes in such cases made and provided, nor alter requirements of law as to standards of milk and its products, and as to the production thereof. (b) For the purposes of this Act, the board shall have power to subpoena milk dealers, their records, books and accounts, and any other person from whom said board may desire information to carry out the purposes and intent of this Act. Any member of the board may issue subpoenas and administer oaths to witnesses. If any person shall fail to appear in response to such subpoena, or to produce such records, books or accounts, or to answer any question addressed to him by any member of said board, the superior court of the county having jurisdiction, or, in case the person is not located in this state, the superior court of Hartford county or any judge thereof when said court shall not be in session, upon application made to it or to him and upon proof being made of such failure, may make an order requiring such witness to appear and testify before said board and answer any question material to such investigation and to produce such records, books or accounts, and, if any person shall fail to comply with any requirement of any such order, said court or such judge shall commit such person to jail until he shall comply therewith, but not for a longer period than sixty days. (c) The board shall have power to require reports of the quantities and sources of milk and cream or any products thereof received by dealers, of the quantities sold by them in the various classes and grades of milk and cream and their products, together with

the prices paid and received for them in their several classes, and such other records and information as the board may deem necessary for the enforcement of this act. (d) The board shall have power to act as investigator and to find, report and publish facts on complaints made to it by producers, dealers or consumers in regard to contracts, agreements and practices which are alleged to be unethical and unfair to the industry; the findings of the board on such complaints, by agreement of parties made in advance of hearing, to become final and binding. Irrespective of complaints addressed to said board by such persons, it may, on its own motion, make such investigations as above outlined and report to the governor, and such reports shall be public documents.

Section 6. Said board shall also have the power to fix and establish, from time to time, a minimum price for the different markets of the state for each class of milk; (a) to be paid to the producers; (b) to be paid, at wholesale or retail, by consumers, such minimum, wholesale and retail prices to cover sales by dealers and licensees, other than stores, to consumers; (c) to be paid to dealers and licensees by stores and other wholesale purchasers, except sales to other dealers or licensees who are shippers or distributors; (d) to be paid to stores by consumers.

Section 7. No person shall distribute or sell milk within the state, unless he shall be licensed as provided herein, nor shall any dealer so licensed sell or offer for sale any milk or cream to any other dealer in the state who is unlicensed, if under the provisions of this act he should be licensed. Applications for licenses to distribute or sell milk shall be made to the board in writing within twenty days after the passage of this act, by milk dealers in business at the time of the passage of this act upon blanks prepared under the authority of the board. Any person who, after July 1, 1933,

shall desire to engage in business as a milk dealer, shall file an application to be licensed not less than fifteen days before he shall engage in such business. The applicant shall state on such blanks such particular information in regard to his business or proposed business relative to the distribution or sale of milk as may reasonably be required by the board. Each application shall be accompanied by a license fee in accordance with the schedule stated in section eight hereof. The board may decline to grant a license or may revoke a license if satisfied after hearing of the existence of any of the following: (1) That the applicant has not complied, and is not prepared to comply, with the provisions of chapter 135 of the general statutes, and the rules and regulations set up under the provisions of said chapter by the milk regulation board; (2) that he has refused, without reasonable cause, milk agreed to be purchased from a producer; (3) that he has failed, without reasonable cause, to account and make payment for milk so purchased; (4) that he has made a general assignment for the benefit of creditors or been adjudged a bankrupt unless he shall file a bond in an amount satisfactory to said board or shall present to said board adequate proof of his ability to pay for milk so purchased; (5) that he is engaged in unfair practices such as giving milk with other purchases or allowing rebates other than ordinary trade discounts; (6) that he has failed either to keep records or furnish statements or information required of him by the board under the provisions of this act; (7) that he has failed to comply with minimum prices fixed by the board under the authority of this act.

Section 8. A milk dealer, in his application, shall state the amount of milk which he usually distributes or sells or proposes to distribute or sell as a daily average. For the purposes of this section, one-half pint of cream shall be considered the equivalent of one quart of milk. For such daily average not in excess of one

hundred quarts the license fee shall be five dollars. License fees shall increase at the rate of five dollars for each daily average of one hundred quarts or fraction thereof so to be distributed or sold. Each plant or store of an applicant shall require a separate license, if there shall be distributed or sold therefrom a daily average in excess of the minimum amount fixed and established by the board. If distributions and sales by a licensee shall prove to be in excess of the daily average of amounts estimated by the licensee, additional license fees, proportional to such excess so sold or distributed, shall be paid by the licensee. The first license period shall be from the date of the issuance of the license to and including June 30, 1934. The following license period shall be from July 1, 1934, to and including June 30, 1935.

Section 9. Any person aggrieved by any action of the board may appeal therefrom to the superior court for Hartford county within ten days after written notice to him of such action. Such appeals shall be taken in the manner prescribed in section 3608 of the general statutes for appeals from the decisions of the public utilities commission. Within ten days after the filing of any such appeal, any person affected by such action of the board may make application to the court to be joined as a party plaintiff.

Section 10. Each application for a license shall be acted upon by the board within twenty days from its receipt. License fees accompanying applications shall be paid by the board to the state treasurer. All applicants whose licenses have been refused shall be entitled to a return of the fees accompanying their application.

Section 11. No provision of this act shall revoke or abridge any existing contract of any cooperative corporation, organized or operated under or subject to the provisions of chapter 194 of the general statutes

or any similar statute of another state and engaged in making collective sales or marketing of milk for the producers thereof from blending the net proceeds of all its sales in various classes, whether in fluid form or as manufactured products, and paying its producers such blended price. No provision of this act shall affect any contract between a nonresident milk dealer and a resident milk producer or between a resident milk dealer and a nonresident producer. No provision of this act shall prevent any dealer from giving milk in charity or from furnishing milk to any charitable association or municipal corporation to be distributed to needy persons for charitable relief, nor from furnishing milk for such charitable purposes at a price below that fixed by the board.

Section 12. The comptroller shall furnish an office for said board in the state capitol or the state office building, together with suitable equipment and supplies therefor.

Section 13. Said board may make and, from time to time, revise such rules and regulations as may be necessary for the administration of this act. Each regulation adopted by said board shall state the date on which it shall take effect, and a copy thereof, signed by the chairman of the board, shall be filed in the office of the secretary of the state. Each such regulation shall be published in such manner as said board may determine.

Section 14. If any provision of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not invalidate the remainder thereof.

Section 15. Any person or the officer of any corporation which shall violate any provision of this act

shall be fined not more than five hundred dollars or imprisoned not more than one year or both.

Section 16. This act shall take effect from its passage, except sections five to ten, inclusive, which shall take effect thirty days after its passage.

Note: Above Bill passed Legislature May 17, 1933.